Supreme Court, U.S.
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Case No. _____

IN THE
Supreme Court of the United States
October Term 1993

STATE OF FLORIDA,

Petitioner,

v.

ALBERT HOLLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT'S APPLICATION OF *POWELL v. TEXAS*, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989), WHICH RESULTED IN THE ORDERING OF A NEW TRIAL, IS CONTRARY TO *POWELL*, AND *BUCHANAN v. KENTUCKY*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), WHERE NEITHER A FIFTH NOR SIXTH AMENDMENT VIOLATION WAS SHOWN WHEN A JAIL-HOUSE PSYCHIATRIST INITIALLY OBSERVED THE DEFENDANT FOR CUSTODY PURPOSES, BUT LATER WAS CALLED BY THE STATE TO TESTIFY REGARDING THOSE OBSERVATIONS CONTRARY TO THE DEFENDANT'S CLAIMED INCOMPETENCY TO STAND TRIAL AND ON REBUTTAL TESTIFIED TO COUNTER AN INSANITY DEFENSE

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Case No. _____

Supreme Court of the United States

October Term 1993

HARRY K. SINGLETARY,

Petitioner,

v.

ALBERT HOLLAND,

Respondent.

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 19 Fla.L.Weekly S142 (Fla. March 24, 1994), and is reproduced in the appendix to this pleading.[1] Petitioner's timely filed rehearing was denied on June 9, 1994.

JURISDICTION

The decision of the Florida Supreme Court was decided on March 24, 1994. Petitioner's motion for rehearing and clarification was denied June 9, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

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1 [A-] represents a citation to the materials contained in the appendix to this pleading.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States of America are involved:

Amendment V, which provides:

> No persons shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Albert Holland was indicted on August 16, 1990, for the first-degree murder of law enforcement officer (Officer Scott Winters), armed robbery, sexual battery (Thelma Johnson), and attempted first-degree murder (Thelma Johnson). Prior to said indictment, on July 30, 1990, Holland's counsel invoked Holland's right to counsel and to remain silent at first appearance. On August 2, 1990, Holland executed a generic rights form. An order issued prohibiting law enforcement interviews outside the presence of Holland's attorney.

On August 3, 1990, Dr. Abbey Strauss, a psychiatrist in private practice in Boca Raton, Florida, working for the Prison Health Services, was asked by nurse Schwarz to look at Holland and provide a second diagnosis as to whether Holland needed further evaluation or could be placed in general population. The record reflects that Dr. Gould had, one month earlier, seen Holland and placed him in the psychiatric wing. Mrs. Schwarz sought a second opinion as to whether Holland needed to continue treatment in the psychiatric wing. Dr. Strauss testified at the competency hearing held December 4, 1990, that it was neither his intent to determine Holland's legal sanity or competency, but rather his sole purpose for his August 3 and 10 examinations was to ascertain whether Holland was in any condition to be placed in general population. Dr. Strauss spent fifteen minutes with Holland on August 3, 1990, and determined, based on this brief conversation with Holland, that he could not conclude whether Holland was competent to be moved into the general population unit. Holland told Dr. Strauss that he, Holland, knew about Thorazine and had taken it before and indicated that he wanted cigarettes. Holland told Dr. Strauss that he had seen his lawyer the day before and indicated that he could talk to his lawyer without any problems. Holland denied all charges

and admitted to the doctor that he had used drugs and abused alcohol in the past.

Based on the information Dr. Strauss received from "other sources to the effect that Holland had been institutionalized for mental health problems and had been a heavy drug user," Dr. Strauss continued Holland's "close observation" and requested certain tests be performed due to Holland's heavy drug usage. On August 10, 1990, Dr. Strauss returned and visited with Holland a second time for about fifteen minutes. No discussion occurred with regard to why Holland was in jail, rather Holland asked for more cigarettes. At that time, Dr. Strauss also reviewed the staff's observations that Holland had spoken lucidly on the phone to his attorney, had watched television and had actually watched stories of the funeral of Officer Winters; and had asked to see a priest.

As a result of these two interviews, Dr. Strauss found Holland's behavior to be manipulative. He also determined, based on other staff members' observations, that Holland had not been any trouble in the unit. As a result of the aforenoted, Dr. Strauss ordered Holland transferred to general population.

On September 5, 1990, defense counsel filed a motion to have the appointment of experts to determine, pursuant to Fla.R.Crim.P. 3.216, Holland's mental competency and his competency at the time of the offense (TR 3322-3323). On September 10, 1990, Judge Futch appointed Drs. Block-Garfield, Koprowski, and Ceros-Livingston (TR 3325-3327). In that order, the court requested reports be prepared by October 19, 1990, to determine competency to stand trial; involuntary hospitalization and insanity at the time of the offense. Dr. Koprowski interviewed Holland on September 21, 1990, and September 28, 1990. Dr. Block-Garfield interviewed on September 28, 1990, September 29, 1990, October 1, 1990,

and October 11, 1990. Holland refused to see Dr. Ceros-Livingston.

On October 22, 1990, a hearing was held based on the State's motion for permission to examine medical records. Said request was granted. Prior to the December 3, 1990, competency hearing, Dr. Strauss was contacted by the State for the first time to review files and records of Holland's mental health history to ascertain whether Holland was competent to stand trial. At the competency hearing held on December 3, 1990, Dr. Koprowski and Dr. Block-Garfield testified, as well as Dr. Strauss. Other witnesses were also called by the State to establish the defendant's competency. They specifically testified as to their observations, conversations and encounters with Holland contemporaneous to this period.[2]

During the course of said hearing, the issue arose as to whether the State was required to move forward with the burden of proving Holland competent to stand trial in that Holland had twice previously been declared not guilty by reason of insanity and hospitalized in Washington, D.C. (TR 58) (Dr. Nuha Abudabbeh's testimony, a psychologist from St. Elizabeth's Hospital in Washington, D.C.). The trial court, following discussions with regard to who had the burden, stated that because Dr. Koprowski and Dr. Block-Garfield prepared reports stating that Holland was incompetent, it was the State's burden to move forward to prove Holland competent to stand trial (TR 50-51).

At the competency hearing, the defense called out of turn Dr. Nuha Abudabbeh, who testified that she had known Holland for more than ten years as a psychologist at St. Elizabeth's Hospital in Washington, D.C. (TR 57).

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2 For example, Lauretta Boccio, a registered nurse at the Prison Health Services, testified that up until two to three weeks prior to Holland's competency hearing she observed Holland as part of her duties. Holland was not psychotic. Holland acted normally (TR 240-246).

Holland had been hospitalized based on a determination by the court that he was not guilty by reason of insanity on two separate occasions (TR 58). On cross-examination by the State, Dr. Abudabbeh admitted that the not guilty by reason of insanity standard in Washington, D.C., was different than Florida's, specifically that it meant Holland was suffering from a mental illness that substantially contributed to his ability to do the right or wrong thing.

On cross-examination, Dr. Abudabbeh further testified that since she was now more experienced with this kind of a situation, she probably would have changed her diagnosis of Holland to borderline personality disorder (TR 68). Based on the tests that were done at St. Elizabeth's Hospital, there was no organic impairment nor was Holland psychotic. He was of normal intelligence but suffered from self-esteem problems and identity problems equating to a personality disorder (TR 68-69). This diagnosis was based on a battery of tests that were done just prior to Holland's escape (TR 70). Dr. Abudabbeh testified that the medication, to-wit: Thorazine BID in 75mg dosage to be taken twice a day, was not a large dosage.

The State then called Dr. Abbey Strauss. Prior to coming to court that day, he had been provided information from the State, specifically a psychological evaluation from Dr. Block-Garfield; a psychological evaluation from Dr. Koprowski; notes from Dr. Ceros-Livingston; clinical notes from the Prison Health Services; a chronological account of events; police reports; other legal papers from Washington, D.C.; brief clinical summaries from other doctors in Washington, D.C.; some letters Holland had written; an escape report; reports from St. Elizabeth's Hospital, and his notes from his visits with Holland, in addition to the two interviews on August 3 and 10, 1990, with Holland.

Following Dr. Strauss' testimony surrounding the August 3 and 10 encounters with Holland in jail, and, based on other information provided to him, it was his view, that the diagnoses that were performed at St. Elizabeth's Hospital were incorrect because Holland's conduct was a result of drug usage, not schizophrenia (TR 106). All the records indicated that there was no gross psychotic behavior and therefore it was clear to Dr. Strauss that Holland was malingering (TR 106). Dr. Strauss reviewed Dr. Block-Garfield's and Dr. Koprowski's reports only after he conducted his August 3 and 10 interviews.

During the course of the competency hearing, Dr. Strauss was handed a letter that was written by Mr. Holland to Judge Futch (TR 114). After reviewing the letter, Dr. Strauss observed that the letter was well-organized and not delusionary (TR 115). He concluded that based on everything he knew he thought Holland appreciated the charges against him and understood the range of penalties that could be imposed. Holland could relate to his attorney and could assist his attorney in his own defense. Holland could challenge state witnesses and could conduct himself appropriately in court. It was his view that Holland wanted to help himself and that he could cope with the stress of pretrial incarceration (TR 116-117).

Dr. Strauss reiterated that it was not his intent when he saw Holland in August 1990, to determine Holland's legal sanity or competency but rather, the purpose for the examinations was to diagnose and provide proper custody (TR 127). As a result of later contact by the State, he reviewed more information which ultimately confirmed his initial observation and determination that Holland did not need to be on the psychiatric unit but could be placed in general population (TR 150). Dr. Strauss indicated that he believed that both Dr. Block-Garfield and Dr. Koprowski were incorrect in their diagnoses that Holland was incompetent.

Dr. Block-Garfield (TR 153-196), and Dr. Elizabeth Koprowski (TR 198-223), testified as to their belief that Holland was not competent to stand trial.

As a result of said hearing, the trial court, in a written order dated December 7, 1990, found Holland competent to stand trial based on the evidence presented, specifically rejecting the opinions of Dr. Koprowski and Dr. Block-Garfield.[3] On December 13, 1990, Holland filed his notice to rely on an insanity defense.

Dr. Strauss was also called as a state witness on rebuttal at trial. Only after Holland presented a defense of insanity, did Dr. Strauss further testify as to his views that Holland was not insane at the time of the crimes.

Dr. Strauss was only one of a number of doctors called to testify as to Holland's competency to stand trial and his sanity at the time of the offense. Once Holland brought his sanity into issue, the State presented evidence in rebuttal including Dr. Strauss and Dr. James Jordan. Based on a plethora of information, including Dr. Strauss' report and that of other doctors, Dr. Jordan concluded Holland knew the difference between right and wrong and could understand the complex nature of events surrounding him and was goal-oriented in his conduct (TR 2795). Dr. Elizabeth Koprowski, one of the attending psychologists who initially found Holland incompetent to stand trial, testified on rebuttal that she was incorrect in her initial conclusion and that it was her belief that Holland was competent and adequately understood the proceedings against him. "I feel he

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3 Holland was returned to general population in the Broward County Jail. Moreover, two days prior to the competency hearing, Dr. Strauss' deposition was taken by defense counsel. Nothing revealed during the deposition or in Dr. Strauss' testimony at the competency hearing resulted from any unique information specifically and solely derived from the two encounters Strauss had with Holland in jail.

did know right from wrong and he understood the consequences of his behavior at the time (of the crime)." (TR 2819).

On August 1, 1991, Holland was convicted of fatally shooting Pompano Beach police officer Scott Winters when the officer tried to apprehend Holland. Holland attempted to elude arrest, following an attack on a woman he had met earlier that day. When Officer Winters attempted to arrest Holland, a struggle ensued. Holland grabbed the officer's gun and shot Winters twice.

On August 12, 1991, the jury returned a death recommendation by a vote of 11-1. On August 19, 1991, the trial court sentenced Holland to death, finding four statutory aggravating factors: (1) Holland had been previously convicted of a violent felony; (2) the murder was committed while engaged in flight from a felony (sexual battery/robbery); (3) the purpose of the murder was to avoid arrest, and (4) the victim was a law enforcement officer. The trial court found there might be a possible history of drug abuse as a mitigating factor. The mitigation did not sufficiently overcome the four substantial aggravating factors.

On appeal, the Florida Supreme Court reversed for a new trial on the Dr. Strauss, *Powell v. Texas,* 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989), issue. A second issue was discussed but was not the basis for reversal.

The Florida Supreme Court specifically held:

> Strauss' testimony was, in the end, the type of testimony the United States Supreme Court disapproved in *Powell v. Texas* (cite omitted)....Because Strauss testified about competency and sanity — and based his opinions almost exclusively on those visits — the lack of notice, as in *Powell,* violated Holland's Sixth Amendment right to consult with

> counsel. The testimony *also* violated article I, section 9, of the Florida Constitution....
>
> In addition, and significantly, Holland had not filed a motion to rely on an insanity defense when Strauss visited him in jail. Florida Rule of Criminal Procedure 3.216(d) allows a compelled examination only after a defendant files notice of intent to rely on an insanity defense. The United States Supreme Court has held that a defendant waives the Fifth Amendment right to remain silent on raising a mental-status defense. *Buchanan v. Kentucky* (cite omitted). In this case, however, Holland had not raised such a defense when Strauss visited him, and, as the judge's order prohibiting law enforcement interviews outside the presence of Holland's attorney underscores, he had not waived his right to remain silent. *Thus, Strauss' testimony as to Holland's sanity violated Holland's Fifth Amendment right to remain silent.*

(emphasis added).

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT'S APPLICATION OF *POWELL v. TEXAS*, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989), WHICH RESULTED IN THE ORDERING OF A NEW TRIAL, IS CONTRARY TO *POWELL*, AND *BUCHANAN v. KENTUCKY*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), WHERE NEITHER A FIFTH NOR SIXTH AMENDMENT VIOLATION WAS SHOWN WHEN A JAIL-HOUSE PSYCHIATRIST INITIALLY OBSERVED THE DEFENDANT FOR CUSTODY PURPOSES ONLY, BUT LATER WAS CALLED BY THE STATE TO TESTIFY REGARDING THOSE OBSERVATIONS CONTRARY TO THE DEFENDANT'S CLAIMED INCOMPETENCY TO STAND TRIAL AND ON REBUTTAL TESTIFIED TO COUNTER AN INSANITY DEFENSE

The Florida Supreme Court has misapprehended the scope of *Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989). In *Powell, supra*, the Court concluded that a violation of Powell's Sixth Amendment rights to the assistance of counsel was violated when, pursuant to a trial court order to undergo a psychiatric examination by a "court-appointed" psychiatrist and psychologist, Powell, without the presence of his counsel and without notification to counsel, was examined on an issue of his "future dangerousness to society." The Court concluded that the critical issue was that Powell was entitled to his Sixth Amendment protection because he was being ordered to submit to a psychiatric evaluation designed to determine his future dangerousness which went to proof of an aggravating factor under the Texas statute. The Court observed:

> In this case there is no dispute that on the day of Petitioner's arrest the trial court, at the State's request, ordered that a psychiatric examination be conducted by Dr. Richard Coons and a psychologist of Dr. Coons' choice to determine Petitioner's competency to stand trial and sanity at the time of the offense. Dr. Coons examined Petitioner on four occasions, and Dr. George Parker, a clinical psychologist, tested Petitioner on two additional occasions. It is also undisputed that neither Petitioner nor his attorney was notified that he would be examined on the issue of future dangerousness and that Petitioner was not informed of his right to remain silent. Finally, it is uncontested that, over Petitioner's objection, Drs. Coons and Parker testified at Petitioner's sentencing hearing that based on these examinations they were of the view that Petitioner 'would commit future acts of violence that would constitute a continuing threat to society.'

492 U.S. at 681-682.

Citing to *Buchanan v. Kentucky,* 483 U.S. 402 (1987), the Court further observed:

> The distinction between the appropriate Fifth and Sixth Amendment analysis was recognized in the *Buchanan* decision. In that case, the court held that the defendant waived his Fifth Amendment privilege by raising a mental-status defense. (cite omitted). This conclusion, however, did not suffice to resolve the defendant's separate Sixth Amendment claim. Thus, in a separate section of the opinion, the court went on to address the Sixth Amendment issue, concluding that on the facts of that case counsel knew what the scope of the

> examination would be before it took place. (cite omitted). Indeed, defense counsel himself requested the psychiatric examination at issue in *Buchanan*. (cite omitted). In contrast, in this case, counsel did not know that the Coons and Parker examinations would involve the issue of future dangerousness.

492 U.S. at 685.

The court determined that "...because the evidence of future dangerousness was taken in deprivation of Petitioner's right to the assistance of counsel, and because there is no basis for concluding that Petitioner waived his Sixth Amendment right, we now hold that *Smith* and *Satterwhite* control...." 492 U.S. at 686.

Since the *Powell* decision, a paucity of cases have relied on *Powell, supra,* holding that individual defendants' Fifth and Sixth Amendment rights have not been violated to the extent new trials should result. For example, in *Hendricks v. Vasquez,* 974 F.2d 1099 (9th Cir. 1992), *reversed on other grounds,* the court found Hendricks' Fifth and Sixth Amendment claims, pursuant to *Powell v. Texas, supra,* unpersuasive. In *Hendricks,* the government sought to have Hendricks interviewed by a government psychiatrist, Dr. Reus. Hendricks argued that Dr. Reus' interview violated Hendricks' Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. The court observed:

> Hendricks' Fifth Amendment claim of error is based on Dr. Reus' failure to read Hendricks' *Miranda* warnings before interviewing him. Although the Fifth Amendment normally bars the government from subjecting the defendant to a psychiatric examination without warning him of his constitutional rights, **a bar is waived once**

> **the defendant introduces psychiatric evidence in support of a mental defense. *Powell v. Texas* (cite omitted). Because Hendricks introduced psychiatric testimony in support of a mental defense, Hendricks waived any Fifth Amendment objections to Dr. Reus' interview of him. *Id.***
>
> Hendricks' Sixth Amendment argument is based on Hendricks' assertion that Dr. Reus' interview exceeded the scope of the trial judge's order allowing the interview. In support of this argument, Hendricks notes that Dr. Reus responded to a question concerning an alleged murder that Hendricks committed at a grocery store. Hendricks also alleges that Dr. Reus testified as to 'other inflammatory matters.'

974 F.2d at 1108 (emphasis added).

The court found that Hendricks had waived his Fifth Amendment objections, but further observed that there still might be a Sixth Amendment deprivation of counsel claim where the government psychiatrist's examination exceeded the scope permitted by the trial court's order and where counsel had not been notified that the examination would exceed that scope. The court reasoned that no Sixth Amendment violation occurred, however, as to other inflammatory matters, it was "impossible to tell whether such matters, assuming they exist, had anything to do with Dr. Reus' interview." 974 F.2d at 1108.

In *Granviel v. Lynaugh,* 881 F.2d 185, 190 (5th Cir. 1989), the court resolved similar claims adversely to the defendant. The Fifth Circuit opined:

> Granviel waived any Fifth Amendment privilege against the introduction of psychiatric testimony.

> He raised the question of his sanity. The prosecution rebutted that claim with the testimony of these examining psychiatrists. **Raising an insanity defense constitutes a waiver of the defendant's protection against self-incrimination with regard to psychiatric testimony.** *Buchanan v. Kentucky,* 483 U.S. 402, 107 S.Ct. 2906, 2917-2918, 97 L.Ed.2d 336 (1987); *Snyder v. Lynaugh,* 835 F.2d 570, 577 (5th Cir.), *cert. denied,* ___ U.S. ___, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988). Here, as in *Buchanan,* the psychiatrists' reports were introduced to rebut the defendant's insanity defense. The psychiatrists' did not reveal any admissions of the defendant concerning his crime. **Therefore, the admission of their testimony, despite the fact that Granviel was not given *Miranda* warnings prior to either examination, did not constitute a violation of Granviel's Fifth Amendment rights.** *Buchanan,* 107 S.Ct. at 2918.

881 F.2d at 190 (emphasis added).[4]

The court further opined with regard to Granviel's Sixth Amendment claim, that:

> Unlike Granviel's Fifth Amendment right, his Sixth Amendment right to the assistance of counsel was not automatically waived by his insanity defense. *Powell v. Texas* (cite omitted). In *Powell,* the Supreme Court clarified the distinction between

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4 No doubt the *Granviel* court was correct in light of *Davis v. United States,* ___ U.S. ___ (Decided June 24, 1994), Case No. 92-1949, wherein the court capitulated that, as far as a right to invoke counsel, a defendant must announce same with the "requisite level of clarity." The court further reaffirmed that *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), is a rule of law not a "constitutional command."

> a defendant's Fifth and Sixth Amendment rights in regard to psychiatric testimony. The court recognized the inherent inequity in permitting a defendant to raise an insanity defense while objecting to disclosure of psychiatric evaluations. The court reasoned, however, that such inequity did not justify denying the defendant assistance of counsel during such examination. (cite omitted).

881 F.2d at 190.

In reviewing the facts and circumstances surrounding the testimony of Dr. Groves and Dr. Holbrook, the court, in *Granviel,* held that his Sixth Amendment rights were not violated with regard to Dr. Groves because his examination had come years earlier, well before any adversarial proceedings had been initiated against him; and as to Dr. Holbrook, Granviel's Sixth Amendment right was waived by his counsel's voluntary decision to seek to have Dr. Holbrook appointed as a disinterested qualified expert pursuant to the Texas procedure.

In *Vanderbilt v. Collins,* 994 F.2d 189 (5th Cir. 1993), that court found a true *Powell v. Texas, supra,* violation, where the exact issue was the one found in *Powell.* Counsel therein did not know that a court-ordered psychiatric examination of the defendant would include the issue of future dangerousness which could be used against the defendant in ascertaining whether, under Texas law, Vanderbilt was death eligible. The court, in performing a harmless error analysis, concluded:

> We think it would strain credulity to conclude that Dr. McTague's testimony, which was quite lengthy and bore the imprimatur of an expert's opinion, did not have a substantial, injurious effect on the outcome of Vanderbilt's second penalty phase.

994 F.2d at 199.

Based on the aforecited cases, it is apparent that *Powell v. Texas, supra,* and any ramifications as to a defendant's Fifth and Sixth Amendment protections, is activated at a point in time when a defendant is "forced" to speak to a psychologist or psychiatrist based on a court order or without notification to counsel as to the court ordered examination or the "scope" of that examination.

None of the circumstances as recited above exist here. If anything, when Dr. Strauss went to see Holland in the Broward County jail, nothing took place at either the August 3 or the August 10 visit that activated Holland's constitutional rights.

The Florida Supreme Court observed:

> ...Nothing in this opinion prohibits someone from testifying about observations of a criminal defendant in jail. As we noted in *Walls,* '[t]he State and its agents clearly are entitled to watch a person in custody and make notes of that persons voluntary or spontaneous behavior of comments.' 580 So.2d at 135. Nor should our opinion be interpreted to prohibit a psychiatric evaluation without notice for the purpose of determining the proper placement of a defendant in jail or for routine psychiatric treatment not related to the issue of competency or sanity.

(Slip opinion, page 7-8).

Everything Dr. Strauss testified to at the competency hearing and on rebuttal at the guilt portion of Holland's trial, occurred post-Holland interposing his mental health status as an issue. **As such it vitiated any Fifth Amendment violation. Moreover, counsel was aware of Dr. Strauss and deposed Dr. Strauss prior to Dr. Strauss testifying as a rebuttal witness at Holland's trial based on the**

medical records and other information made available to him only after Holland's competency became an issue. Dr. Strauss' observations of Holland for unrelated custodial reasons on August 3 and August 10 did not constitute "the psychiatric evaluations" contemplated under *Powell,* and *Buchanan,* or, for that matter, *Satterwhite v. Texas,* 486 U.S. 249 (1988), or *Estelle v. Smith,* 451 U.S. 454 (1981).

Indeed, in a remarkably similar case, in *State v. Shields,* 586 A.2d 655 (Del. 1990), the Superior Court of New Castle County, Delaware, found no Fifth or Sixth Amendment violation. The facts therein reflect that the defendant, Joseph Shields, was charged by indictment for first degree murder. He sought to preclude Dr. David Raskin from psychiatrically evaluating him on behalf of the State. Shields argued that Dr. Raskin had been retained by the State to psychiatrically evaluate him regarding his competency to stand trial and his sanity at the time of the alleged incident. Shields argued that Dr. Raskin had already seen him at least once for the purposes of a custodial evaluation even though no court order had been entered by the court authorizing such an evaluation. The facts reveal:

> In addition to maintaining a private practice through which he was eventually retained by the State in this case, Dr. Raskin is also under contract with Corrections Medical Systems, Inc., to provide psychiatric services to inmates in the custody of the Delaware Department of Corrections. Dr. Raskin delivers such services directly to many inmates, asserts the defendant, and also supervises other Correctional mental health staff in providing mental health care to inmates. In those capacities, Dr. Raskin has, according to the understanding of defense counsel, been involved in the treatment of the defendant at Gander Hill during his current incarceration. The defendant's communications to

> Dr. Raskin with respect to that treatment are, concludes the defendant, confidential and privileged under Delaware's Rule of Evidence 503. Defendant further concludes that Dr. Raskin has a professional duty of care to the defendant regarding such treatment....

586 A.2d at 656.

Shields argued that it would seem,

> ...virtually impossible for Dr. Raskin to separate information obtained from the defendant or other sources in connection with his treatment of the defendant, from information acquired in his more formal evaluation of the defendant on behalf of the State....Finally, the defendant contends that his counsel could not provide adequate guidance to him or monitoring of the State's evaluation of him under such circumstances, and that, therefore, the defendant's right to the effective assistance of counsel in connection with such an evaluation, vouchsafed by the Sixth and Fourteenth Amendments to the United States Constitution, Article 1, Section VII, of the Delaware Constitution, would be violated.

586 A.2d at 657.

After reviewing in great detail the "constitutional issues", [including *Powell* and *Buchanan, supra*] 586 A.2d at 659-661, Shields' Fifth and Sixth Amendment rights, the court observed:

> The aforementioned United States Supreme Court opinions do not, in this Court's view, assist the defendant in expousing constitutional infirmities with regard to the facts of this case. Presumably, the result of this decision, the prosecution

> will request a court order, with notice to defense counsel, permitting the State to psychiatrically evaluate the defendant on the limited issues of competency and sanity. The court sees no constitutional flaws in such a process. The notice requirement fulfills the State's duty under the Sixth Amendment. Defense counsel would then be in a position to counsel her client regarding the State's evaluation and regarding the scope thereof. Further, no *Miranda* warnings are necessary if Dr. Raskin restricts his evaluation to the issues of competency to stand trial and mental illness. (cite omitted)....
>
> The court concludes that since the defendant has placed his mental condition at issue, any psychotherapist/patient privilege which the defendant may have had, with regard to Dr. Raskin, has been waived, especially when, as here, the court finds that Dr. Raskin's role has not been that of a treating physician but rather as a supervising consultant. Further, the court concludes that no constitutional rights which the defendant may possess have been violated by the State's contemplated action in having defendant psychiatrically evaluated by Dr. Raskin.

586 A.2d at 661.

The Florida Supreme Court has expanded the *Powell* and *Buchanan* decisions far beyond intentions. Holland's Sixth Amendment rights were never in jeopardy. Indeed, caselaw demonstrates that Dr. Strauss could have sat outside Holland's jail cell — never speaking one word to him or relating why he was there and made the same observations that occurred here. Any Fifth Amendment right Holland may have possessed was waived when Holland's competency became an issue. The observations recorded by Dr. Strauss

were admissible simply because Dr. Strauss was contacted by the State only after questions arose as to whether Holland was competent to stand trial.

Albeit, caselaw interpreting *Powell v. Texas, supra,* is sparse, the possible ramifications the Florida Supreme Court's interpretation of that decision is alarming. What the court has proposed is that no doctor treating an inmate may speak or engage in a dialogue without first determining whether that person has counsel. If a treating doctor should do so without counsel's presence then that doctor can never be called as a witness, no matter how valid the observations. And, where the defendant tells the doctor of his rights, relates nothing to the doctor about the crime and where the defendant ultimately asserts an insanity defense, that doctor is forever barred from speaking his observations. Such a result is contrary to the holdings in *Powell* and *Buchanan.*

CONCLUSION

Wherefore, for the aforementioned reasons, Petitioner respectfully requests the Petition for Writ of Certiorari be granted, summary reversal result and the case be remanded to the Florida Supreme Court for affirmance of Holland's first-degree murder conviction and sentence of death.

Respectfully submitted,

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COUNSEL FOR PETITIONER

Case No. _____

IN THE

Supreme Court of the United States

October Term 1993

STATE OF FLORIDA,

Petitioner,

v.

ALBERT HOLLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF PETITIONER

APPENDIX

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SUPREME COURT OF FLORIDA

THURSDAY, JUNE 9, 1994

ALBERT HOLLAND,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

CASE NO. 78,660

Circuit Court No. 90-15905
CF10 (Broward)

Appellee's Motion for Rehearing and Clarification filed in the above cause is hereby denied.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, J., and McDONALD, Senior Justice, concur

A True Copy

TEST

Sid J. White
Clerk, Supreme Court

TC

cc: Hon. Robert E. Lockwood, Clerk
Hon. M. Daniel Futch, Judge
Mr. Richard B. Greene
Ms. Carolyn Snurkowski

SUPREME COURT OF FLORIDA

No. 78,660

ALBERT HOLLAND, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[March 24, 1994]

PER CURIAM.

Albert Holland, Jr., appeals his convictions of first-degree murder of a law enforcement officer, armed robbery, sexual battery, and attempted first-degree murder and the sentences imposed, including a sentence of death. We have jurisdiction based on article V, section 3(b)(1) of the Florida Constitution.

Holland was convicted of fatally shooting Pompano Beach police officer Scott Winters. The killing occurred when Winters tried to arrest Holland for sexual battery and attempted first-degree murder. The jury convicted Holland of first-degree murder and recommended death by a vote of eleven to one. The trial judge followed the jury's recommendation and sentenced Holland to death. We reverse the convictions and sentences because a contract jail psychiatrist's testimony should not have been used in a competency hearing and at trial on the issue of Holland's sanity.

The record reflects these relevant facts: Holland attacked a woman he met on the afternoon of July 29, 1990. Holland ran off after a witness interrupted the attack by shouting, "Man, you're gonna kill that woman." Police officers responding to a call about the attack found the victim semiconscious with severe head wounds. Based on witnesses' accounts, police—including Officer Winters—began searching for a man believed to have been involved in the attack. A short time later, witnesses saw Winters struggling with Holland. During the struggle, the officer hit Holland with a nightstick and put Holland in a headlock. Holland grabbed the officer's gun and shot Winters twice. Police officers testified that Winters called for backup at 7:25 p.m., then called at 7:26 p.m. and said he had been shot. When officers reached Winters, they saw that his gun was missing. Winters died of gunshot wounds to the groin and lower stomach area at 8:30 p.m.

After his indictment, Holland raised the issue of his competency to stand trial. The trial judge found him competent. Holland's defenses at trial included sanity.

Holland raises twenty-four issues on this direct appeal,[1] the first of which is dispositive. Holland claims that the trial court erred in overruling defense counsel's objections to the testimony of a State witness, psychiatrist Abbey Strauss, who testified at the competency hearing and at trial. We

---

1 Holland raises these issues: (1) whether the trial court erred in overruling defense counsel's objections to the testimony of Dr. Strauss; (2) whether the trial court erred in allowing irrelevant collateral crimes testimony into evidence; (3) whether the trial court erred in removing Holland's original counsel without notice and a hearing and over Holland's subsequent objection; (4) whether the trial court failed to make an adequate inquiry into Holland's complaints about counsel; (5) whether the trial court erred in holding an inadequate inquiry into Holland's desire for self-representation and in refusing to allow Holland to represent himself; (6) whether the trial court erred in granting the prosecution's special jury instruction on felony murder; (7) whether the trial court erred in forcing defense counsel to proceed without any means of communications with Holland; (8) whether the trial court erred in failing to suppress Holland's statements; (9) whether the trial court erred in overruling appellant's objection to the admissibility of the inaudible videotape; (10) whether the evidence of premeditation is legally sufficient; (11) whether the trial court erred in refusing to allow release, or at least in-camera review, of the grand jury testimony; (12) whether the trial court erred in allowing the prosecution to proceed on a theory of felony murder when the indictment gave no notice of the theory; (13) whether the trial court erred in denying a continuance of trial; (14) whether the trial court erred in denying a penalty phase continuance; (15) whether Holland's absence from the hearing on the motion to continue the penalty phase is reversible error; (16) whether the court erred in denying a requested instruction concerning the doubling of aggravating circumstances; (17) whether the trial court erred in its finding of aggravating circumstances and in its failure to find and consider unrebutted nonstatutory mitigating circumstances; (18) whether death is disproportionate; (19) whether the court erred in refusing to give a jury instruction on Holland's use of intoxicants during the offense; (20) whether the trial court erred in failing to give instructions on Holland's background and history of drug addiction; (21) whether aggravating circumstance of committed during an enumerated felony is unconstitutional on its face and unconstitutionally applied; (22) whether aggravating circumstance that the victim was a law enforcement officer is unconstitutional on its face and as applied; (23) whether the trial court erred in departing from the guidelines sentence without a contemporaneous departure order; and (24) whether Florida's death penalty statute is unconstitutional.

agree. Accordingly, we reverse both the convictions and sentences.

Holland invoked his rights to counsel and to remain silent during his first appearance on July 30, 1990. The judge indicated at the hearing that he would sign an order prohibiting law enforcement interviews outside the presence of Holland's attorney. After the judge entered his order dated July 30, 1990, Strauss, a contract psychiatrist with the Broward County Jail, examined Holland twice in jail in August 1990 to help determine whether Holland needed further mental-health evaluation or could be put into the jail's general population. There was no notice to counsel. The State, however, later contacted Strauss and secured his testimony on the issues of Holland's competency and sanity. Strauss was the State's only expert witness at the competency hearing and was a key prosecution witness on the issue of sanity.

The record reflects that Strauss's testimony drew almost exclusively on his observations and impressions from his August jail visits. Strauss testified at the competency hearing that after his two visits at the jail he concluded Holland was malingering. Although Strauss later reviewed additional information, including records of Holland's earlier psychiatric hospitalization, he testified that the information simply reinforced his initial conclusion. During his testimony, Strauss also suggested that Holland might have responded differently to him during the jail visits if Holland had known the results would be used on the issue of competency.

Strauss's testimony that Holland was competent to stand trial was crucial because the court-appointed mental health experts testified that Holland was incompetent. The trial judge noted that he had never gone against court-appointed mental health experts, but he nonetheless agreed with Strauss and found Holland competent to stand trial. Thus,

the error in allowing Strauss's testimony on competency cannot be harmless.

The record also shows that Strauss's jail visits—not his review of additional information—convinced him of Holland's sanity. During trial, he testified that he formed his opinion after the second jail visit:

> Q [on cross-examination by defense attorney]. In fact, your opinion didn't change since the first day you saw Albert Holland, did it?
>
> A [by Strauss]. Since the second day I saw him.
>
> Q. Second day, you mean when you went to see him the second time?
>
> A. Yes.
>
> Q. And at that time, you didn't have the benefit of any medical-prior medical record?
>
> A. I didn't feel at the time it was necessary.
>
> Q. Okay. And even though you saw some four or five years of medical records from Saint Elizabeth's Hospital, that still didn't change your opinion?
>
> A. No.

It is obvious from the record that Strauss's observations and findings during the August jail visits formed the basis of his testimony at the competency hearing and at trial. Defense counsel had no notice of these visits. Lack of notice would not be a problem if Strauss's testimony been confined to his observations of Holland, as opposed to his expert opinions relating to Holland's competency and sanity. *Walls v. State,* 580 So.2d 131, 135 (Fla. 1991) ("The state and its agents clearly are entitled to watch a person in custody and make notes of that person's voluntary or spontaneous

behavior or comments."). In addition, we have held that "[p]sychiatric evaluations conducted *in good faith and with proper authorization* also clearly are an acceptable means for the state to employ, especially when competency or sanity may be in issue." *Id.* (emphasis added).

Strauss's testimony was, in the end, the type of testimony the United States Supreme Court disapproved in *Powell v. Texas,* 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989). In *Powell* the Court found that the introduction of psychiatric evidence on future dangerousness based on an in-custody psychiatric exam conducted without notice to counsel violated the Fifth and Sixth Amendments to the United States Constitution. While the introduction of defense evidence on insanity constitutes a partial waiver of a defendant's Fifth Amendment rights against self-incrimination, the introduction of psychiatric evidence to support an insanity defense does not waive his Sixth Amendment right to consult with counsel. *Id.* at 684-85. Defense counsel in *Powell* had notice that his client would be examined for competency and sanity, but he did not have notice that the exam would encompass the issue of future dangerousness. *Id.* at 682. Defense counsel in the instant case did not even have notice of Strauss's jail visits. Because Strauss testified about competency and sanity—and based his opinions almost exclusively on those visits—the lack of notice, as in *Powell,* violated Holland's Sixth Amendment right to consult with counsel. The testimony also violated article I, section 9 of the Florida Constitution. As Strauss himself testified, Holland's responses might have been different had he known the ultimate nature of the visits. Strauss thus should not have been allowed to testify about Holland's competency and sanity based on information he acquired during the August visits.

In addition, and significantly, Holland had not filed a motion to rely on an insanity defense when Strauss visited him in jail. Florida Rule Criminal Procedure 3.216(d) allows

a compelled examination only after a defendant files notice of intent to rely on an insanity defense. The United States Supreme Court has held that a defendant waives the Fifth Amendment right to remain silent on raising a mental-status defense. *Buchanan v. Kentucky,* 483 U.S. 402, 421-24, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). In this case, however, Holland had not raised such a defense when Strauss visited him, and, as the judge's order prohibiting law enforcement interviews outside the presence of Holland's attorney underscores, he had not waived his right to remain silent. Thus, Strauss's testimony as to Holland's sanity violated Holland's Fifth Amendment right to remain silent.

Our resolution of this issue is confined to the circumstances of the instant case. Nothing in this opinion prohibits someone from testifying about observations of a criminal defendant in jail. As we noted in *Walls,* "[t]he state and its agents clearly are entitled to watch a person in custody and make notes of that person's voluntary or spontaneous behavior or comments." 580 So.2d at 135. Nor should our opinion be interpreted to prohibit a psychiatric evaluation without notice for the purpose of determining the proper placement of the defendant in jail or for routine psychiatric treatment not related to the issues of competency or sanity.

Although the first issue requires reversal of Holland's conviction and sentences, we discuss the second issue—whether the trial court erred in allowing irrelevant collateral crime testimony into evidence—to avoid the possibility of any error upon retrial. Holland complains that the trial court should not have allowed the State to cross-examine three mental-health professionals about other crimes. We find no error in the cross-examination because the State properly tested the strength of the mental-health professionals' findings.

Holland further argues that the testimony of three other State witnesses was irrelevant. On this point we agree. First, a District of Columbia prosecutor testified about 1989 criminal charges against Holland for possession of cocaine with intent to distribute and battery on a law enforcement officer. Whatever limited relevance these charges might have had, the prosecutor's testimony improperly focused on Holland's exercise of his legal rights in the courtroom. In addition, the prosecutor testified over objection to several hearsay statements, including his testimony about the circumstances in which Holland walked away from a halfway house and did not appear in court.

Second, we find irrelevant the testimony of a pipe fitter who worked with Holland at a prison and testified that Holland did not give him his correct name. This testimony was irrelevant to the issues in this case.

Finally, the testimony of a District of Columbia police officer about a 1989 incident in which Holland was charged with a drug offense and assault on a law enforcement officer was not relevant. The officer testified that Holland tried to grab his service revolver during a struggle. Collateral crimes are relevant to prove a material fact in issue such as motive, intent, absence of mistake, or identity. § 90.404(2)(a), Fla.Stat. (1993); *see also Minick v. State,* 560 So.2d 386, 387 (Fla. 3d DCA 1990). The record reflects that the purpose of the evidence in this case was to show Holland's propensity to struggle with a police officer when arrested. Evidence of collateral crimes or acts is not admissible to show a criminal defendant's propensity. *Williams v. State,* 110 So.2d 654, 662 (Fla.), *cert. denied,* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). This was not, as in *Williams,* evidence admissible to show a plan, scheme, or design. *Id.* at 662. The admission of improper collateral offense evidence is presumed harmful. *Straight v. State,* 397 So.2d 903, 908 (Fla.), *cert. denied,* 454

U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). It should not be allowed on retrial.

We do not address the other issues Holland raises. Because the State improperly relied on the testimony of Strauss during the competency hearing and at trial, we find that Holland's right of due process and his Fifth and Sixth Amendment rights were violated. Accordingly, we reverse and remand for a new trial.

It is so ordered.

BARKETT, C.J., and SHAW, GRIMES and HARDING, JJ., concur.
OVERTON, J., concurs specially with an opinion.
KOGAN, J., concurs in result only.
McDONALD, dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., specially concurring.

I find that the United States Supreme Court's decision in *Powell v. Texas,* 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989), is absolutely controlling on Strauss's testimony at the trial on the merits as a state expert on Holland's claim of insanity at the time of the offense. However, I do not believe that Strauss was a proper witness on the issue of competency to stand trial. These are two distinct issues and, in my view, *Powell* does not control the competency-at-trial question.

McDONALD, J., dissenting.

The majority makes a mistake in granting a new trial because of the use of Dr. Strauss' testimony. Dr. Strauss testified on two occasions: (1) the pretrial hearing to determine competency to stand trial and (2) at trial on the issue of insanity at the time of the commission of the crime. No

objection to his ability to testify because of a claimed fifth or sixth amendment violation was raised at either proceeding. The issue is therefore procedurally barred.[2]

Had the issue been preserved, I believe Dr. Strauss' testimony to be proper. Dr. Strauss was, in effect, a treating physician. He did not initially examine Holland for any trial purpose. Dr. Strauss was recommending where Holland should be placed and assisting in his psychiatric health care. His interviews were not conducted to elicit information of the crime or with the purpose of using it against him.

The majority inadvertently misapplies *Powell v. Texas,* 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989). That case has no application to this one. In *Powell,* the state examined a defendant for the purpose of using a death aggravating factor of future dangerousness against a prisoner without giving a fifth amendment warning and in violation of his sixth amendment right to counsel. This is a distant cry from what transpired in this case. It was only after Holland raised the competency and insanity issues that any thought was given to using Dr. Strauss as a witness.

The majority also errs in stating that Dr. Strauss was the only witness for the state on the issue of insanity. He was

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2 I find no objection at all in the record at the competency hearing. The only objection at the trial is found in the following dialogue subsequent to the state's qualifying Dr. Strauss as an expert:

> Mr. Satz: Your honor, at this time I'd like to offer Doctor Strauss as an expert in the field of forensic psychiatry.
>
> Mr. Giaconna: Your honor, the only objection we have for the record is that he first acquired knowledge of our client as an employee for the state and then later became an expert of the state attorney, but the overlap we feel should be an abuse of the privilege. We respectfully object.
>
> The Court: I'll declare him to be an expert.

The objection made did not urge a fifth or sixth amendment violation.

the only one at the competency hearing, but had the company of at least two other state experts at trial.

If there were errors in this trial, they were harmless. There was no question that Holland committed the homicide. The only real issue is that of Holland's mental condition, and that issue was fairly tried.

Holland deserves to be convicted. Holland deserves the death penalty. We should affirm both.

An appeal from the Circuit Court in and for Broward County,

M. Daniel Futch, Jr., Judge - Case No. 90-15905CF10

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for Appellant

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